In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1210

CIRILO FIGUEROA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a non-jury trial in the United States District Court for the Southern District of New York, petitioner was found guilty on four counts charging violations of the federal narcotics laws (21 U.S.C. (1964 ed.) 173, 174; 26 U.S.C. (1964 ed.) 4705 (a), 7237(b)) (Pet. App. A1-A12). He was sentenced to concurrent five-year terms of imprisonment (Pet. App. A17-A18). Petitioner's motion to arrest judgment was denied (Pet. App. A13-A16), and the court of ap-

peals affirmed the conviction without opinion (Pet. App. A19-A20).

The evidence, which is summarized at some length in the district court's opinion (Pet. App. A1-A7), revealed that an undercover agent of the Bureau of Narcotics and Dangerous Drugs, Dominic Petrossi, was introduced to petitioner by Jose Josende and Manuel Chacon in New York City in February 1970. Petrossi told petitioner that the narcotics which he had purchased from Josende in Chicago had not been of satisfactory quality and that he had asked to contact the source of Josende's drugs so that the source could guarantee the quality of the drugs. The agent proposed paying one-half of the price in advance of delivery in Chicago and paying the remainder to petitioner in New York after delivery. In response to a question by Josende, Petrossi said that he wanted one kilogram of heroin. Chacon said that he would obtain the narcotics from petitioner and give them to Josende, who would deliver them at the agent's hotel. Later, Josende delivered 495.7 grams of heroin.

In March 1970, Petrossi, this time with another agent, again met petitioner in New York. After petitioner asked the agent how much money he had, Petrossi replied "$14,000." He said that he wanted to buy one-half kilogram each of heroin and cocaine, on the payment basis previously proposed. Petitioner then wrote on a napkin the figures "13,500," indicating the price of the heroin, and "7,000," indicating the price of the cocaine. Petrossi took the napkin, wrote "$10,000" on it, and returned it to

petitioner, who said "O. K." Subsequently, petitioner told Petrossi that he would deliver the narcotics to Chacon, Chacon would deliver them to Josende, and Josende would deliver them to Petrossi. Later that evening, Josende delivered to Petrossi 558.6 grams of heroin and 502.8 grams of cocaine.

1. Most of petitioner's claims—*i.e.*, that the evidence was insufficient to establish that he had possessed the heroin; that, contrary to Rule 23(c), Fed. R. Crim. P., the trial court erroneously entered findings of fact and conclusions of law without petitioner's request; that Rule 43, Fed. R. Crim. P., was violated since he was not present when the verdict was rendered (*i.e.*, filed) on December 27, 1971; and that the delay of approximately sixty days from the close of the case to the filing of the general finding of guilt was violative of his rights—were carefully considered and correctly rejected by the district court in its opinion (Pet. App. A1-A12) and in its memorandum denying petitioner's motion to arrest judgment (Pet. App. A13-A16).

2. Petitioner's other contentions are also without merit. He has failed to substantiate his claim that there was an unreasonable delay between his arrest and arraignment which prejudiced his right to a fair trial. Petitioner was arrested on June 22, 1970, in the Southern District of New York on the basis of a warrant issued in the Northern District of Illinois. After several adjournments, consented to by petitioner, a hearing was held on August 5, 1970, before a United States commissioner in the Southern District

of New York. After the government had shown that petitioner was in fact the person named in the warrant, removal to the Northern District of Illinois was ordered.[1] Subsequently, at petitioner's request, the case was transferred back to the Southern District of New York pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure and was received there around December 8, 1970. On May 3, 1971, petitioner entered a plea of not guilty and the case was assigned to a judge. Trial commenced on October 13, 1971.

The period between arrest on June 22, 1970, and the return of the case to the Southern District of New York on December 8, 1970, was largely the consequence of adjournments prior to transfer to which petitioner consented and of the processing of his own request to have the case returned to New York. With respect to the remaining ten months prior to trial, including the five month delay before arraignment in New York,[2] petitioner has not shown that the delay was purposeful on the part of the government or that he was prejudiced. While co-defendant Chacon[3] disappeared prior to petitioner's arraignment in May 1971, there is no showing that he was available at any time after the case was transferred to New York. Moreover, there is no indication that Chacon would

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[1] Petitioner was free on bond at all times prior to conviction.

[2] Petitioner had previously been arraigned in the Northern District of Illinois and had pleaded not guilty.

[3] Chacon was arrested with petitioner in New York and his case was ordered removed to Illinois. Subsequently, his case was also transferred to New York for trial.

have waived his Fifth Amendment privilege against self-incrimination and offered testimony beneficial to petitioner. Under these circumstances, petitioner has failed to sustain his claim of a violation of his right to a speedy trial.[4] *United States* v. *Ewell*, 383 U.S. 116; *United States ex rel. Solomon* v. *Mancusi*, 412 F. 2d 88 (C.A. 2).[5]

3. Effective May 1, 1971 (prior to petitioner's conviction), the statutes under which petitioner was convicted and which provided for a five-year mandatory minimum prison term were repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970. P.L. 91-513, Sections 1101(a) (2), 1101(b) (3) (A), 1101(b) (4) (A), 1105(a), 84 Stat. 1291-1292, 1295.

At sentencing on January 24, 1972, petitioner, relying upon the Ninth Circuit's decision in *United States* v. *Stephens*, 449 F. 2d 103, requested that the court consider imposing less than the five-year mandatory

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[4] Petitioner also seemingly suggests that the alleged delay here was prejudicial to him in that he was unable to remember the events of the day on which it was said that he wrote the figures on the napkin. Thus, he asserts that he was surprised by the introduction of the napkin into evidence as an exhibit and was unable to find witnesses in his behalf to indicate whether or not he was in the restaurant or whether or not he wrote on the napkin. This contention is without merit, since the original indictment, filed in June 1970, put petitioner on notice that it might be necessary to account for his activities on the day in question.

[5] The case of *Ross* v. *United States*, 349 F. 2d 210 (C.A. D.C.), cited by petitioner, is not in point, as that case dealt with pre-arrest delay.

minimum term. The court refused to do so and imposed the mandatory minimum term on each count. Petitioner now asks this court to resolve an asserted conflict between *Stephens* and the decision of the Second Circuit in *United States* v. *Fiotto*, 454 F. 2d 252, pending on petition for a writ of certiorari, No. 71-1114, and, implicitly, the decision of the court of appeals here.

As we have previously discussed in other briefs, there is no conflict between *Stephens* and those cases upholding the imposition of the five-year minimum mandatory term upon those sentenced after May 1, 1971. See, *e.g.*, our briefs in opposition in *Robert Wollack, Jr.*, v. *United States*, No. 71-992, O.T. 1971, and *Stanley Wooden* v. *United States*, No. 71-6085, O.T. 1971.* *Stephens* held that the repeal of 26 U.S.C. (1964 ed.) 7237(d), which prohibited the granting of probation or of suspended sentences in certain cases involving violations of the narcotics laws, permitted suspension of the sentence there and the release of the defendant on probation—an issue not present in this case.

It is our position, as fully set forth in our brief in *Wollack*, that irrespective of the date of sentencing, the sentencing provisions of 21 U.S.C. (1964 ed.) 174 and 26 U.S.C. (1964 ed.) 7237(b) remain in force by virtue of the specific savings clause of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (P.L. 91-513, Section 1103(a), 84 Stat.

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* We are supplying petitioner with a copy of each of these briefs.

1294), as well as the general federal savings statute (1 U.S.C. 109), for narcotics violations occurring prior to May 1, 1971.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1972.

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